Next 6 Page(s) In Document Denied

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INTELLIGENCE IDENTITIES PROTECTION ACT

AUGUST 13, 1980.—Ordered to be printed
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Mr. CHAFEE (for Mr. BAYH), for the Select Committee on Intelligence, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 2216]

The Select Committee on Intelligence, to which was referred the bill (S. 2216) to improve the intelligence system of the United States, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

PURPOSE

The purpose of S. 2216, as reported, is to strengthen the intelligence capabilities of the United States by prohibiting the unauthorized disclosure of information identifying certain United States intelligence officers, agents and sources of information and operational assistance, and by directing the President to establish procedures to protect the secrecy of these intelligence relationships.

AMENDMENTS

Strike all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Intelligence Identities Protection Act of 1980".

SEC. 2 (a) The National Security Act of 1947 is amended by adding at the end thereof the following new title:

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and the category covered by section 501(a), is under section 501(a) the offender must have had authorized access to specific classified information which identifies the covert agent whose disclosure is the basis for the prosecution. Section 501(b), on the other hand, requires that the identity be learned only "as a result" of authorized access to classified information in general.

As with those covered by section 501(a), those in the 501(b) category have placed themselves in a special position of trust vis-a-vis the United States Government. Therefore, it is proper to levy stiffer penalties and require fewer elements to be proved than for those who have never had any authorized access to classified information (see section 501(c)). However, the Committee recognizes that there is a subtle but significant difference in the position of trust assumed between an offender within the section 501(a) category and an offender in the section 501(b) category. Therefore, the penalty for a conviction under section 501(b) is a fine of $25.000 or five years imprisonment, or both.

With the two exceptions discussed above—the relationship of the offender to classified information and the penalty for conviction—the two offenses, and the elements of proof thereof are the same.

Section 501(c) applies to any person who discloses the identity of a covert agent.

As is required by subsections (a) and (b), the government must prove that the disclosure was intentional and that the relationship disclosed was classified. The government must also prove that the offender knew that the government was taking affirmative measures to conceal the classified intelligence relationship of the covert agent. As is also the case with subsections (a) and (b), the actual information disclosed does not have to be classified. However, the government must prove that the defendant knew that he was disclosing a classified relationship the government seeks to conceal by affirmative measures.

Unlike the previous two sections, authorized access to classified information is not a prerequisite to a conviction under section 501(c). An offender under this section has not voluntarily agreed to protect any government information nor is he necessarily in a position of trust. Therefore, section 501(c) establishes three elements of proof not found in sections 501(a) or (b). The United States must prove—

That the disclosure was made in the course of a pattern of activities, i.e., a series of acts having a common purpose or objective;

That the pattern of activities was intended to identify and expose covert agents; and

That there was reason to believe such activities would impair or impede the foreign intelligence activities of the United States.

S. 2216, as introduced, required that to be criminal the disclosure made by those with no access to classified information would have to be made "with the intent to impair or impede the foreign intelligence activities of the United States."

The bill, as reported, replaces this intent standard with a more objective standard which requires that the disclosure must be "in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair and impede the foreign intelligence activities of the United States." This requirement makes it clear that the defendant must be engaged in a

conscious plan to seek out undercover intelligence operatives and expose them in circumstances where such conduct would impair U.S. intelligence efforts.

It is important to note that the pattern of activities must be intended to identify and expose such agents. Most laws do not require intentional acts, but merely knowing ones. The difference between knowing and intentional acts was explained as follows in the Senate Judiciary Committee report on the Criminal Code Reform Act of 1980:

> As the National Commission's consultant on this subject put it, "it seems reasonable that the law should distinguish between a man who wills that a particular act or result take place and another who is merely willing that it should take place. The distinction is drawn between the main direction of a man's conduct and the (anticipated) side effects of his conduct." For example, the owner who burns down his tenement for the purpose of collecting insurance proceeds does not desire the death of his tenants, but he is substantially certain (i.e., knows) it will occur.

A newspaper reporter, then, would rarely have engaged in a pattern of activities with the requisite intent "to identify and expose covert agents." Instead, such a result would ordinarily be "the (anticipated) side effect of his conduct."

Under the definition of "pattern of activities," there must be a series of acts with a common purpose or objective. A discloser must, in other words, be in the business, or have made it his practice, to ferret out and then expose undercover officers or agents where the reasonably foreseeable result would be to damage an intelligence agency's effectiveness. Those who republish previous disclosures and critics of U.S. intelligence would all stand beyond the reach of the law if they did not engage in a pattern of activities intended to identify and expose covert agents.

A journalist writing stories about the CIA would not be engaged in the requisite "pattern of activities," even if the stories he wrote included the names of one or more covert agents, unless the government proved that there was intent to identify and expose agents and that this effort was undertaken with reason to believe it would impair or impede foreign intelligence activities. The fact that a journalist had written articles critical of the CIA which did not identify covert agents could not be used as evidence that the purpose was to identify and expose covert agents. To meet the standard of the bill, a discloser must be engaged in a purposeful enterprise of revealing names—he must, in short, be in the business of "naming names."

The following are illustrations of activities which would not be covered:

> An effort by a newspaper to uncover CIA connections with it, including learning the names of its employees who worked for the CIA.
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> An effort by a university or a church to learn if any of its employees had worked for the CIA. (These are activities intended to enforce the internal rules of the organization and not identify and expose CIA agents.)

An investigation by a newspaper of possible CIA connections with the Watergate burglaries. (This would be an activity undertaken to learn about the connections with the burglaries and not to identify and expose CIA agents.)

An investigation by a scholar or a reporter of the Phoenix program in Vietnam. (This would be an activity intended to investigate a controversial program and not to reveal names.)

The government, of course, has the burden of demonstrating that the pattern of activities was with the requisite intent to identify and expose covert agents. The government's proof could be rebutted by demonstrating some alternative intent other than identification and exposure of covert agents. The government must also show that the discloser had reason to believe that the activities would impair or impede the foreign intelligence activities of the United States. For example, a reporter could show that by printing a name of someone commonly known as a CIA officer he could not reasonably have expected that such disclosure would impair or impede the foreign intelligence activities of the United States.

SECTION 502—DEFENSE AND EXCEPTIONS

Section 502(a) states that "it is a defense to a prosecution under section 501 that before the commission of the offense with which the defendant is charged, the United States had publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution." The words "publicly acknowledged" are intended to encompass such public activities as official publications of the United States, or official statements or press releases made by those acting on behalf of the United States, which specifically acknowledge an intelligence relationship. The United States has "revealed" an intelligence relationship if it has disclosed information which names, or leads directly to the identification of, an individual as a covert agent. Information does not lead directly to such an identification if the identification can be made only after an effort to seek out and compare, cross-reference, and collate information from several publications or sources which in themselves evidence an effort by the United States to conceal this identity.

Section 502(b)(1) and (2) ensure that a prosecution cannot be maintained under section 501(a), (b), or (c), upon theories of aiding and abetting, misprison of a felony, or conspiracy, against an individual who does not actually disclose information unless the government can prove the "pattern of activities" and the intent and "reason to believe" elements which are part of the substantive offense of section 501(c). A reporter to whom is disclosed, illegally, the identity of a covert agent by a person prosecutable under section 501(a) or (b) would most likely not be engaging in the requisite course of conduct, because he would not likely be engaged in a pattern of activities intended to identify and expose covert agents.

Section 502(c) is intended to make clear that disclosures made directly to the House or Senate Intelligence Committees are not criminal offenses.

Section 502(d) states that "it shall not be an offense under section 501 for an individual to disclose information that solely identifies